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Office of Administrative Hearings

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Saint Paul, Minnesota 55164-0620

Carol Nankivel (minnrule7050.pca@state.mn.us)

Minnesota Pollution Control Agency

520 Lafayette Road North

Saint Paul, Minnesota 55155-4194

RE: Proposed Rules Governing Antidegradation of Waters Minnesota Rules, parts 7001.0050, 7050.0218, 7050.0250 through 7050.0335 and 7052.0300 and the Repeal of Rules Governing Nondegradation of Waters, Minnesota Rules, parts 7050.0180 and 7050.0185; Revisor's ID Number 4030

Dear Judge Oxley, Ms. Nankivel:

The following comments are submitted on behalf of WaterLegacy regarding the Minnesota Pollution Control Agency (MPCA) proposed rules governing antidegradation of Minnesota waters. WaterLegacy is a Minnesota non-profit organization formed to protect Minnesota's water resources and the communities that rely on them. We have over 9,000 members and supporters actively engaged in preventing water pollution in the Lake Superior Basin, the Boundary Waters watershed and throughout Minnesota.

We've read MPCA's proposed antidegradation rules with concern. We believe the proposed rules violate federal law, conflict with Minnesota statutes and policies to protect waters of the state from degradation, undermine public participation and fail to provide a reasonable structure for antidegradation assessment. They would fail to protect Minnesota high quality and outstanding resource value waters from degradation.

Under the Minnesota Administrative Procedures Act (APA) and its implementing rules, an agency's proposed rule must be disapproved by the administrative law judge if it "conflicts with, does not comply with or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law." Minn. R. 1400.2100, item D.

The federal Clean Water Act mandates that state regulation of surface water must be at least as stringent as the requirements of federal statutes and regulations. 33 U.S.C. §1370. MPCA's enabling statute affirms this requirement, stating that the agency shall have the authority to

establish “standards, procedures, rules, orders, variances, stipulation agreements, schedules of compliance, and permit conditions, consistent with and, therefore not less stringent than” the provisions of applicable federal law. Minn. Stat. §115.03, Subd. 5.

Although Minnesota rules to protect water quality may not be *less* stringent than federal law, States may develop water quality standards more stringent than required by regulations under the Clean Water Act. 40 C.F.R. §131.4(a). In addition to failing to meet minimum standards, the MPCA’s proposed antidegradation rules conflict with state statutes, other sections of existing Minnesota rules and long-standing highest priority policies of Minnesota to protect waters of the state. The narrowing of protection from degradation proposed in these rules is neither needed nor reasonable.

WaterLegacy is concerned that the MPCA’s rule has evolved over the past several years to meet the requirements of dischargers, rather than to protect water resources and communities. We are also concerned that the MPCA’s proposed antidegradation rules would reduce the State’s capacity to regulate and control degradation from the proposed PolyMet NorthMet copper-nickel mine project. With these comments, we have submitted Exhibit 1, a memorandum entitled PolyMet NorthMet Proposal and MPCA Proposed Antidegradation Rulemaking.

In these comments, WaterLegacy is requesting that the MPCA’s proposed antidegradation rules be disapproved by the Administrative Law Judge or withdrawn by the MPCA so that their principal sections can be substantially rewritten. A baker’s dozen of our significant concerns with the proposed antidegradation rule are summarized below.

1. MPCA proposed rules would allow degradation of surface water uses for wildlife and for human consumption of fish that are protected under the Clean Water Act.

Federal law requires that all uses identified in Clean Water Act Section 101(a)(2) must be protected from degradation in high quality waters. 40 C.F.R. §131.12(a)(2). This is the bare minimum requirement for state antidegradation standards. Clean Water Act Section 101(a)(2) protects “fish, shellfish and wildlife” as well as “recreation in and on the water.” 33 U.S.C. §1251(a)(2). MPCA’s proposed rules fail to provide this protection.

Under federal law, the term “fish” includes all aquatic organisms in the food web and includes effects on human health from fish consumption. Regulations explain that aquatic organisms “can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals.” 40 C.F.R. §230.31(a) and (b). In updating federal antidegradation rules in 2015, the U.S. Environmental Protection Agency (EPA) explicitly explained that Clean Water Act Section 101(a)(2) uses of water for “fish” includes human health consuming fish as well as the propagation of aquatic life. 80 Fed. Reg. 51027 (Aug. 21, 2015).

MPCA’s proposed rules exclude protection for wildlife and for human health in consumption of fish through the definition of “high quality” waters that will be protected from degradation. In antidegradation law, the definition of “high quality” waters is critical. This tier of water quality

means *all* waters that comply with water quality standards for at least some parameter and have not been designated in the very short list of “outstanding resources value” waters. In Minnesota, the vast majority of the waters of the state would be considered “high quality” waters for some parameters.

MPCA’s definition of “high quality” water refers only to the protection and propagation of “aquatic life and recreation in and on the water.” MPCA proposed rule 7050.0255, Subp. 21, p. 5, l. 24 to p. 6, l. 2. Antidegradation provisions for individual NPDES permits and certifications apply only to “high quality” waters. MPCA proposed rule 7050.0265, Subp. 5, p. 12, ll. 12-13. The factors used to determine whether existing uses of water are protected also fails to evaluate wildlife or effects on human health resulting from consumption of contaminated fish. MPCA proposed rule 7050.0265, Subp. 2, p. 10, l. 24 to p. 11, l. 8.

The SONAR acknowledges the difference between federal regulations at 40 C.F.R. §131.12(a)(2) which use the terms “fish, shellfish, and wildlife,” and the MPCA’s proposal to use the phrase “aquatic life.” MPCA SONAR, p. 34. The SONAR contains no explanation why the proposed rule does not protect wildlife uses from degradation and does not discuss the issue of human health resulting from consumption of fish other than to state that other Minnesota statutes and rule also use the phrase “aquatic life.” *Id.*

A closer look at the other Minnesota references cited in the SONAR underscores that the MPCA’s proposed rules would *exclude* protection of wildlife and human health in consuming fish in violation of Clean Water Act Section 101(a)(2) and federal antidegradation regulations. In Minnesota Statutes §115.01, protection of wildlife and human health are distinct from “aquatic life”:

"Pollution of water," "water pollution," or "pollute the water" means: (a) the discharge of any pollutant into any waters of the state or the contamination of any waters of the state so as to create a nuisance or render such waters unclean, or noxious, or impure so as to be actually or potentially harmful or detrimental or injurious to public health, safety or welfare, to domestic, agricultural, commercial, industrial, recreational *or* other legitimate uses, *or* to livestock, animals, birds, fish *or* other aquatic life. Minn. Stat. 115.01, Subd. 13. (emphasis added)

Similarly, in Minnesota Rule 7050.0140, subpart 3, public health is distinguished from “aquatic life.” The rule states that Class 2 standards may require water quality control “to protect aquatic *or* terrestrial life *or* their habitats *or* the public health, safety, or welfare.” Minn. R. 7050.0140, Subp. 3. (emphasis added). A plain language reading of Minnesota law would suggest that water quality control only to protect “aquatic life” would exclude current protection of terrestrial life, habitats and the public health, safety, and welfare.

There is no text in the MPCA’s SONAR providing any intention or assurance that water quality for wildlife or public health in the consumption of fish would be protected from degradation. The dangers of mercury bioaccumulation highlight this concern. Levels of methylmercury that impair

the developing brains of infants and children as a result of fish consumption are much lower than those that would affect propagation of the fish themselves.

MPCA's proposed rules, at the most basic level, violate the Clean Water Act and implementing federal antidegradation regulations.

Recommendation:

Wildlife and the public health, safety and welfare in consumption of fish must be protected from degradation.

2. MPCA's proposed rules would unreasonably eliminate antidegradation protection of surface water for drinking water.

Minnesota's current antidegradation rules state,

It is the policy of the state to protect all waters from significant degradation from point and nonpoint sources and wetland alterations and to maintain existing water uses and aquatic and wetland habitats. Existing beneficial uses and the water quality necessary to protect the existing uses must be maintained and protected from point and nonpoint sources of pollution. Minn. R. 7050.0185, Subpart 1.

MPCA's proposed rules eliminate antidegradation protection for the beneficial use of surface waters for drinking water. As explained above, Class 1 beneficial uses of waters for drinking water (Minn. R. 7050.0140, Subp. 2) are excluded from protection by virtue of the definition of "high quality waters" to include only those qualities needed for the protection and propagation of aquatic life. MPCA proposed rule 7050.0255, Subp. 21, p. 5, l. 24 to p. 6, line 2.

Only "high quality waters" are protected from degradation resulting from issuance or certification of individual permits. MPCA proposed rule 7050.0265, Subp. 5, p. 12, ll. 12-13. For storm water sewers and certification of general permits, only Class 2 surface waters can be considered high quality waters. MPCA proposed rule 7050.0270, Subp. 4, item A, p. 15, ll. 5-9.

Federal antidegradation regulations do not explicitly mandate protection of surface water for drinking water, but all existing instream water uses must be protected. 40 C.F.R. §131.12(a)(1). The Clean Water Act states that state water quality standards, implemented through permitting, be set to "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." The statute continues, "Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." 33 U.S.C. §1313(c)(2)(A).

Minnesota's current rule and policy protects the quality of potable water from degradation. Degradation of drinking water is a public health issue. It is also an economic issue. Human health impacts of drinking water contamination, including brain damage to children, create costs throughout the community for health, special education and mental health services and reduce

future economic productivity. When surface or groundwater must be treated to remove contaminants, another economic cost is shifted from the polluter to the community.

The SONAR contains no discussion of the consequences of contaminating surface water used for drinking water and no explanation why removing this protection is either reasonable or necessary.

The record indicates that MPCA did not consult with the Minnesota Department of Health (MDH), let alone community stakeholders, about its proposal to remove protection of drinking water and groundwater from degradation. The SONAR suggests that the only notice MPCA provided to the MDH was to send a GovDelivery notice to MDH staff when the rules were published for public comment. MPCA SONAR, p. 133. That December 7, 2015 public notice (wq-rule3-60a_0 in the MPCA's rule documents) did not mention that the proposed rule would exclude drinking water and groundwater from antidegradation protection.

Recommendation:

All beneficial uses of Minnesota surface waters, including use for drinking water, must continue to be protected from degradation.

3. MPCA proposed rules would unreasonably eliminate antidegradation protection of groundwater.

The MPCA's elimination of groundwater protection from degradation is contrary to Minnesota statutes, rules and policy.

Minnesota rules define the scope of Chapter 7050 provisions protecting water quality. Parts 7050.0130 to 7050.0227 (including antidegradation provisions at 7050.0185), "apply to all waters of the state, both surface and underground." Minn. R. 7050.0110. Minnesota's current antidegradation rules apply "to protect all waters of the state from significant degradation." Minn. R. 7050.0185, Subp. 1. Minnesota Statutes define "waters of the state" to include groundwater, as follows:

"Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof. Minn. Stat. §115.01, Subd. 22.

Since at least 1989, Minnesota statutes have set a goal "that groundwater be maintained in its natural condition, free from any degradation caused by human activities." Minn. Stat. 103H.001. Pursuant to Minnesota Statutes 103H.201, which was adopted in 1994, Minnesota has developed health risk limits for groundwater to protect human health. These health risk limits are intended to be used by agencies in regulating human activity to prevent degradation of groundwater. Minn. R. 4717.7810, Subp. 1, Subp. 2. Minnesota's 2006 Clean Water Legacy Act, for which

dedicated funding was provided through a constitutional amendment in 2008, also explicitly includes the purpose “to protect groundwater from degradation.” Minn. Stat. §114D.10, Subd. 1.

Minnesota rules in Chapter 7060 underscore the state’s priority to protect the actual or potential use of underground waters for drinking water from degradation:

It is the policy of the agency to consider the actual or potential use of the underground waters for potable water supply as constituting the highest priority use and as such to provide maximum protection to all underground waters. The ready availability nearly statewide of underground water constitutes a natural resource of immeasurable value which must be protected as nearly as possible in its natural condition. For the conservation of underground water supplies for present and future generations and prevention of possible health hazards, it is necessary and proper that the agency employ a nondegradation policy to prevent pollution of the underground waters of the state. Minn. R. 7060.0200.

Minnesota Rules in Chapter 7060 further emphasizes that Chapter 7050 provisions, including antidegradation, “also apply to underground waters” and that where differences exist between parts 7050.0100 to 7050.0220 and Chapter 7060, “the more stringent of the conditions shall be construed to apply.” Minn. R. 7060.0200.

In addition to Minnesota’s statutes and policies requiring protection of groundwater from degradation, federal antidegradation regulations pertaining to Clean Water Act Section 404 permits for the dredge and fill of wetlands to which Section 401 certifications apply explicitly protect groundwater. Dredge and fill of aquatic resources can only be allowed if a factual determination is made that there is no significant degradation of municipal and private water supplies, consisting of surface water or ground water. 40 C.F.R. §§230.10(c)(1); 230.50.

Many of the human activities that pose significant risks to degradation of groundwater are regulated with NPDES permits and subject to Section 401 certification. A new or expanded mining or other industrial discharge, for example, may increase levels of lead and manganese (both of which are toxic to the developing brains of infants and children) in groundwater used for residential drinking water wells in addition to affecting surface waters. Removing protection of groundwater from antidegradation rules would mean that regulators would have no authority to require assessment of alternatives to groundwater degradation or to impose permit or certification conditions to protect children’s health.

The elimination of groundwater antidegradation analysis from permitting activities and Clean Water Act Section 401 certification review conflicts with longstanding Minnesota statutes, rules and policies and is neither reasonable nor necessary. Governor Mark Dayton has made protection of Minnesota groundwater from point and nonpoint source pollution one of his highest priorities. In fact, the MPCA recently released a Groundwater Recommendations Report¹ including findings and recommendations regarding degradation of groundwater. The MPCA found,

¹ MPCA, Groundwater Recommendations Report, January 2016, available at <https://www.pca.state.mn.us/sites/default/files/lrwq-gw-1sy16.pdf>

Degraded groundwater quality can limit access to safe and reliable sources of drinking water for many Minnesotans who rely on groundwater as their primary source of drinking water. When groundwater becomes contaminated, public health concerns arise and significant costs can be incurred to monitor and treat contaminated water supplies. Of additional concern, contaminated groundwater can also contribute to the pollution of surface waters; especially in areas where there is karst geology or shallow sand and gravel aquifers that are closely connected to surface water. MPCA, Groundwater Recommendations Report, p. 4.

The Groundwater Report cited EPA analysis stating that it costs about 10 to 30 times more to clean up contaminated drinking-water wells than it does to prevent the contamination. “Therefore,” the Report concluded, “protecting drinking-water sources makes sense from two perspectives: public health and economic.” *Id.*, p. 4. The Report’s recommendations included, “Recognize that groundwater contaminants have consequences both in underground waters and surface waters. Avoid compartmentalizing groundwater as separate from surface water.” *Id.*, p. 28. Ironically, among the strategies MPCA Report identified to protect groundwater from human-caused contaminants were “permit regulations,” “discharge limits,” and “permit requirements.” *Id.*, pp. 4, 6.

The removal of protection of Minnesota drinking water and groundwater from degradation is contrary to Minnesota statutes and regulations, federal and state policy, and the Groundwater Recommendations Report published by the MPCA. It is neither needed nor reasonable.

Recommendation:

Groundwater must be protected from degradation in NPDES permitting and Section 401 certification.

4. MPCA’s proposed rules would authorize violations of water quality standards in violation of federal Clean Water Act regulations.

Federal law requires that any NPDES permit issued by a state must include conditions necessary to achieve state water quality standards, including state narrative criteria for water quality. 40 C.F.R. §§122.44(d)(1); 123.25(a)(15). Federal law prohibits states from issuing NPDES permits that do not provided compliance with Clean Water Act requirements and, specifically, to a new source or new discharger if the discharge from its construction or operation will “cause or contribute to the violation of water quality standards.” 40 C.F.R. §§122.4(a), (i); 123.25(a)(1).

The MPCA’s proposed antidegradation rules fail to provide required Clean Water Act protection to the first tier of Minnesota waters, where some beneficial uses may already be impaired. For these waters, MPCA only proposes that the commissioner shall not approve a proposed activity, NPDES permit or section 401 certification that would “*permanently*” preclude attainment of water quality standards. MPCA proposed rule 7050.0265, Subp. 4, p. 12 ll.10-11; 7050.0270, Subp. 3, p. 15 ll. 3-4. Exemptions from antidegradation review may also apply if the proposed

action would not “permanently” preclude attainment of water quality standards. MPCA proposed rules 7050.0275, Subp. 1, Item B, p. 16, l.20 to p. 17, l.1.

Were this proposed rule applied, it would exclude from antidegradation protection additional sulfate discharge to wild rice waters that already exceed water quality standards, the addition of more mercury to waters that are already impaired for human consumption, or the further nutrient loading of nutrients to waters that are already degraded by eutrophication. In the real world there is virtually no proposed discharge that would “permanently” preclude attainment of water quality standards, since no polluter has a business plan to last forever. Virtually any violation of water quality standards could be approved as not “permanent.”²

The MPCA’s suggestion that its proposal comports with federal regulations at 40 C.F.R. § 122.44(d), MPCA SONAR, p. 58, is misguided. The proposed rules undermine the clear federal prohibition against issuance of NPDES permits that allow discharge that causes or contributes to violation of water quality standards.

Approving Section 401 certification when a proposed activity would violate water quality standards is also inconsistent with federal regulations pertaining to Clean Water Act Section 404 permits the dredge or fill of wetlands and other aquatic resources. No discharge of dredged or fill material can be permitted if it “causes or contributes” to violations of any applicable State water quality standard. 40 C.F.R. §230.10(b)(1).

Recommendation:

The antidegradation rule must provide that the commissioner shall not issue an NPDES permit or a Section 401 certification that causes or contributes to the violation of water quality standards.

5. MPCA proposed rules would authorize degradation to remove existing uses of water in violation of federal regulations implementing the Clean Water Act.

MPCA’s proposed rules would authorize degradation that removes existing uses of water when a surface water is altered. Federal antidegradation regulations provide the following minimum requirement for state rules: “Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” 40 C.F.R. §131.12(a)(1).

MPCA proposed rules appropriately define “existing uses” for purposes of antidegradation to mean “those uses actually attained in the surface waters on or after November 28, 1975.” MPCA proposed rule 7050.0255, Subp. 15, p. 5, ll. 3-4.

However, MPCA’s proposed rules also create a concept of “compensatory mitigation” that would provide a significant loophole to allow removal of existing uses in individual permitting or Section 401 certification. “Compensatory mitigation” is defined as “the restoration,

² The standard definition is that “permanently” means “existing perpetually; everlasting, especially without significant change.” See e.g. <http://www.dictionary.com/browse/permanent>.

establishment, or enhancement of surface waters to replace the loss of an existing use resulting from a physical alteration of a surface water.” MPCA proposed rule 7050.0255, Subp. 9, p. 3, ll. 15-18.

MPCA then proposes that “the commissioner shall allow compensatory mitigation for the loss of an existing use resulting from physical alterations to surface water” under specified conditions. MPCA proposed rule 7050.0265, subp. 3, p. 11, l. 9 to p. 12, l. 9. “Compensatory mitigation” for loss of existing uses would only be prohibited for outstanding resource value waters. MPCA proposed rule 7050.0265, Subp. 3, item D, p. 12, ll. 6-9. “Mitigation” to restore the “lost existing use” could be provided in a different body of water and could be provided in a different watershed; it would not be required to occur before the degradation occurs. MPCA proposed rule 7050.0265, Subp. 3, Item A, p. 11, ll. 9-22. Although such mitigation might serve to replace aquatic resources, it would not maintain and protect existing instream uses and the level of water quality needed to protect those existing uses as required under the federal antidegradation law. 40 C.F.R. §131.12(a)(1).

It appears from the SONAR that the MPCA may have failed to recognize that “loss of aquatic resources” is different from “loss of existing uses” of water. The SONAR cited 33 C.F.R. §332.2 as support for its compensatory mitigation concept. MPCA SONAR, p. 24. However, Part 332 of Title 33 of the Code of Federal Regulations contains the Federal Mitigation Rule that allows wetlands banks, in lieu payments, and wetlands replacement for unavoidable loss of wetlands and other aquatic resources. The Federal Mitigation Rule does not address the degradation of water quality, let alone the ability to remove existing uses of water.³

MPCA’s proposed “compensatory mitigation” provisions violate federal antidegradation regulations precluding removal of existing uses, and MPCA’s stated basis for allowing compensatory mitigation is inapplicable.

Recommendation:

Remove the entire concept of “compensatory mitigation” from proposed antidegradation rules.

6. MPCA proposed rules violate federal regulations that only allow degradation of high quality waters when lowering water quality is necessary to accommodate important economic or social development.

Federal antidegradation requirements are clear. Degradation of high quality waters may only be allowed as follows:

Before allowing any lowering of high water quality, pursuant to paragraph (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the

³ Separate provisions of federal regulations prohibit degradation from Section 404 dredge and fill of wetlands and other aquatic resources. See 40 C.F.R. §230.10(c).

proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation. 40 C.F.R. §131.12(a)(2)(ii).

EPA guidance clarifies that this finding that a lowering is necessary depends on both an analysis of alternatives and an analysis related to economic and social development. 80 Fed. Reg. 51032 (Aug. 21, 2015).

MPCA's proposed rule fails to provide a satisfactory analysis for either aspect of this finding. Although the purpose section of MPCA's proposed rules in 7050.0250, Item B, p. 2 ll. 1011, tracks federal language, stating that degradation of high quality water "shall be minimized and allowed only to the extent necessary to accommodate important economic or social development," MPCA's proposed implementation falls far short of federal requirements.

First, the MPCA's proposed definition of "feasible alternatives" would allow project proponents to exclude alternatives they don't deem "affordable" and exclude practicable alternatives. MPCA proposed rule 7050.0255, Subp. 17, p. 5, ll. 10-13. Federal regulations provide a definition for feasible alternatives that should be applied. "Feasible alternative" means technologically possible, able to be put into practice and economically viable." 40 C.F.R. §131.3(n).

Next, MPCA's structure of decision-making on alternatives places a burden on the commissioner to find that there is an alternative to prevent degradation, rather than placing responsibility on an applicant to demonstrate that there is no feasible and prudent alternative that would avoid lowering water quality. MPCA proposed rule 7050.0265, Subp. 5, Item A, p. 12, ll. 14-20; 7050.0270, Subp. 4, Item B, p. 15, ll. 10-17.

In addition, the MPCA's proposed antidegradation standard focuses only on alternatives that *avoid* degradation. Two federal rule requirements have been completely dropped in the MPCA's proposal. According to the MPCA, the commissioner need not analyze a range of practicable alternatives to *lessen* degradation, and there is no requirement that the commissioner *adopt* such an alternative if one is identified. Contrast 40 C.F.R. §131.12(a)(2)(ii) with MPCA proposed rule 7050.0265, Subp. 5, Item A, p. 12, ll. 14-20; 7050.0270, Subp. 4, Item B, p. 15, ll. 10-17.

Finally, the MPCA proposed rules require no demonstration that *lowering of water quality is necessary* to accommodate important economic or social changes. For individual NPDES permits and certifications the commissioner shall authorize degradation of high quality waters on a finding "that economic or social changes resulting from the proposed activity are important in the geographic area in which degradation of existing water quality is anticipated." MPCA proposed rule 7050.0265, Subp. 5, p. 12, ll. 21-25.

Federal requirements for analysis and implementation of practicable alternatives to prevent and lessen degradation are clearly defined in the antidegradation rule. They should be adopted in Minnesota rules, particularly since that is ostensibly the justification for the rulemaking.

Recommendation:

Preclude issuance of a permit or certification for an activity that would degrade water quality unless the commissioner finds, after an analysis of feasible and prudent alternatives that would prevent or lessen the degradation, that all of the following conditions are met: 1) there is no feasible and prudent alternative that would prevent the degradation associated with the proposed activity; 2) lowering of water quality is necessary to accommodate important economic or social development in the area where the waters are located; and 3) if a feasible and prudent alternative that would prevent or lessen the degradation associated with the proposed activity has been identified, that such alternative has been selected unless doing so would result in other adverse impacts on the environment or human health. Proposed rule language is provided in section 7 recommendations below.

7. MPCA's proposed rules conflict with federal requirements that ensure highest standards are achieved for all new and existing point sources and apply best management practices to point and nonpoint source pollution.

Federal regulations require that state antidegradation rules, at a minimum, must contain assurance that the highest statutory and regulatory requirements for all new and existing point sources shall be achieved and that all cost-effective and reasonable best management practices for nonpoint source control shall be achieved. 40 C.F.R. §131.12(a)(2) and (a)(2)(ii).

MPCA's proposed rules fail to provide this minimal protection from degradation of high quality waters. None of MPCA's antidegradation standards or procedures require *any* demonstration or assurance that any level of management practices have been met for nonpoint source control. Neither MPCA's proposed standards in 7050.0265 and 7050.0270 nor the MPCA's proposed procedures in 7050.0280 through 7050.0325 even mention "nonpoint" sources of pollution.

The proposed rule suggests that an NPDES permit or Section 401 certification "will achieve compliance with all applicable state and federal surface water pollution control statutes and rules administered by the commissioner." MPCA proposed rule 7050.0265, Subp. 5, Item C, p. 13, ll. 16-19; 7050.0270, Subp. 4, Item D. p. 15, ll. 21-25. However, a closer look shows that federal requirements for achievement of the highest state and federal standards would not be met.

First, a Section 401 certification is not a "control" document for a regulated activity, as suggested in MPCA's proposed rule definitions. MPCA proposed rule 7050.0255, Subp. 10, p. 3, ll. 19-23. The underlying federal permit is the control document. In Minnesota, Section 401 certifications often do not address all discharges from a facility. In addition, they generally rely on existing NPDES permits for compliance with water pollution control statutes, even when the applicable permit sets no limits for most surface water contaminants and has "monitor only" provisions that fail to require compliance with water quality statutes and rules.⁴ A Section 401 certification will not ensure compliance with regulatory requirements even for the facility proposing the new activity.

⁴ See, for example, WaterLegacy Comments on NorthShore Mine certification, November 4, 2015, attached as Exhibit 2.

Further, as explained in the SONAR, MPCA does not intend to address noncompliance with water quality standards because of “other facilities” or “upstream compliance problems,” because doing so “would be unfair to the new or expanding activity.” MPCA SONAR, p. 67. This approach unreasonably adopts the perspective of a new discharger, but fails to protect the water body from degradation.

In Minnesota, where expired permits and variances fail to set effluent limitations and permit violations may be unenforced for decades,⁵ failing to require existing sources to achieve regulatory standards before new degradation is authorized removes a much-needed incentive for regulatory review and pollution control. The MPCA’s proposed regulations fail to comply with federal antidegradation regulations and will not reasonably protect Minnesota waters from degradation.

Recommendation:

Provide a clear and uniformly applicable antidegradation demonstration in compliance with federal rules, including the assurance of compliance with standards and use of best management practices. A draft replacement for 7050.0265, Subpart 3 is suggested below.

Subp. 3. **Protection of high quality waters.** Waters will be protected from degradation by the commissioner as high quality waters on a parameter-by-parameter and condition-by-condition basis, where water quality for that parameter or condition exceeds the levels required to attain beneficial uses in a water body. The commissioner shall not permit or provide section 401 certification for a proposed activity that would degrade water quality unless, after analysis of a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity, the commissioner makes all of the following findings:

- A. water quality adequate to protect and maintain existing uses is assured;
- B. there is no feasible and prudent alternative that would prevent the degradation associated with the proposed activity;
- C. lowering of water quality is necessary to accommodate important economic or social development in the area where the waters are located;
- D. if a feasible and prudent alternative that would prevent or lessen the degradation associated with the proposed activity has been identified, that such alternative has been selected unless doing so would result in adverse impacts on the environment or human health;
- E. the highest statutory and regulatory requirements for all new and existing point sources have been achieved;
- F. all cost-effective and reasonable best management practices for nonpoint source control have been achieved;

⁵ EPA is currently investigating a Petition for Withdrawal of Program Delegation from the State of Minnesota for NPDES Permits filed by WaterLegacy in July 2015 due to concerns that the MPCA failed to update, set appropriate limits, or enforce mining pollution permits and that the industry had undue influence on permits, enforcement and rulemaking. The Petition is available at <http://www2.epa.gov/mn/npdes-petition-program-withdrawal-minnesota>. A copy of the Final Protocol for this investigation is attached as Exhibit 3.

G. public participation and intergovernmental coordination procedures have been followed.

8. MPCA's proposed rules fail to require an effective assessment of the nature and extent of degradation that would result from the proposed activity.

No antidegradation protections can be intelligible or effective unless there is a rigorous assessment of water quality. MPCA's proposed rules fail to require an applicant for an NPDES permit or certification to provide an analysis or disclosure of the proposed degradation until *after* the commissioner has already made the determination that there are no feasible and prudent alternatives to avoid degradation. MPCA proposed rule 7050.0280, Subp. 2, p. 19, l. 9 to p. 20, l. 15 (individual NPDES permits); 7050.0285, Subp. 2, p. 22, ll. 3-6 (certification for individual permits). Then, MPCA rules only require the applicant to provide "a comparison" of existing and anticipated water quality based on the least degrading alternative. MPCA proposed rule 7050.0280, Subp. 2, Item C, p. 20, ll. 6-11.

This proposal is backwards. In order to evaluate whether degradation is avoided, the commissioner and concerned members of the public and scientific community first need to know the nature and extent of the degradation that would result from the proposed activity. The sequence and paucity of data proposed by MPCA would not permit either the commissioner or any other reviewer to evaluate whether other feasible and prudent alternatives would avoid or lessen the proposed degradation.

At a minimum, the applicant's antidegradation assessment should provide the following water quality degradation analysis:

- 1) specific identification of water quality, including each parameter or condition that would be degraded by the proposed activity;
- 2) the baseline for each such parameter or condition;
- 3) an assessment of existing uses;
- 4) a summary of other actions that have lowered water quality and a determination of cumulative impacts on water quality and existing uses;
- 5) an analysis of the impact that the proposed action will have on water quality, including all specific parameters, conditions and existing uses that would be affected.

The applicant's antidegradation assessment should then provide the following alternatives analysis to allow the commissioner to determine if there are feasible and prudent alternatives that would avoid or lessen proposed degradation:

- 1) analysis of technologically feasible alternatives that would avoid degradation, including design, operation, reliability and costs;
- 2) analysis of technologically feasible alternatives that would lessen degradation, including the least degrading alternative, including design, operation, reliability and costs; and
- 3) analysis of the impacts that the alternatives that would lessen degradation (paragraph 2 above) would have on water quality and existing uses.

In order to ensure that the commissioner can make an antidegradation determination consistent with federal regulations despite the delegation to the applicant of the primary responsibility of an antidegradation assessment, the rule should also authorize the commissioner to request additional information from the applicant, if needed to make a decision. Such authority is missing from the MPCA proposed rules, where the commissioner shall conduct the antidegradation “based on the information provided under subpart 2 and other reliable information available to the commissioner.” MPCA proposed rule 7050.0280, Subp. 3, p. 20, ll. 16-20.

Although EPA guidance allows a state to rely on analysis by a permit applicant, States “remain ultimately responsible for making findings to allow degradation and for basing their decisions on adequate analyses.” 80 Fed. Reg. 51033 (Aug. 21, 2015). MPCA’s proposed antidegradation rules must be substantially revised so that applicants provide an adequate analysis to support antidegradation findings and decisions in accordance with federal regulations.

Recommendation:

Rewritten rules must require the applicants’ antidegradation assessment to contain at least the requirements for water quality degradation analysis and alternatives analysis outlined above in this section.

9. MPCA’s proposed rules remove the baseline that protects high quality waters from deterioration of water quality inconsistent with federal guidance and state policy.

Under existing Minnesota law, the baseline quality from which degradation is determined for high quality waters is the January 1, 1988 date of antidegradation policy, except when an existing discharge is eliminated or reduced or if better data becomes available. Minn. R. 7050.0185, Subp. 6.

In its Nondegradation Rulemaking Issue Paper 7, the MPCA explained that using the effective date of adoption of standards as a baseline for high quality waters was included as part of the initial federal antidegradation policy established by the Department of the Interior in 1968. MPCA, Nondegradation Rulemaking Issue Paper 7, Sept. 2008, p. 2.⁶ Although some states have no firm baseline and use the date of the permit application as the baseline for determining degradation, this approach has poor consequences for water quality.

As the MPCA explained in its Issue Paper 7, “This approach and others that do not establish firm baseline conditions can result in slowly deteriorating water quality, because incremental *de minimis* discharges slowly cause a lowering of water quality without an antidegradation review.” *Id.*, p. 2. The MPCA further noted that EPA Region 9 antidegradation guidance supports the concept of a fixed baseline unless some action improves water quality, which would allow for the baseline to be adjusted accordingly. *Id.*, p. 3.

⁶ MPCA, *Nondegradation Rulemaking Issue Paper 7: How are baseline conditions used in the assessment of impacts on receiving waters?* wq-rule3-16, September 2008, available at <https://www.pca.state.mn.us/sites/default/files/wq-rule3-16.pdf>

Despite federal guidance and its own policy conclusions, the MPCA proposes to change the baseline for antidegradation of high quality waters to the date of the applicant's last NPDES permit or Section 401 certification or, if the applicant didn't have a prior permit or certification, the date of issuance of the proposed permit or certification through its use of the new term "effective date." MPCA proposed rule 7050.0255, Subp. 13, p. 4, ll. 6-11. The SONAR explicitly justifies this change in baseline as necessary in order to allow MPCA to make decisions that allow for "limited" degradation of high quality waters. MPCA SONAR, p. 3.

The MPCA's proposed change in the antidegradation baseline for high quality waters would grandfather degradation of high quality waters that the MPCA has allowed since January 1, 1988 due to failure to require effluent limits in permits, inappropriate use of variances and schedules of compliance, failure to timely update permits, and failure to enforce compliance with permits.⁷ Where existing permits have lacked effluent limits or when the MPCA has failed to enforce permit violations, the MPCA could not consider the prior degradation of high quality waters it has authorized before issuing a permit or certification allowing a new discharger to further degrade high quality waters.

In addition to promoting degradation, the MPCA's proposed rules setting a new baseline for the degradation of high quality waters are neither transparent nor consistent. To determine what baseline is even applicable, one must find the definitions for "effective date," which is used as part of the definition of "existing water quality," which is then used as part of the definition of "degradation." MPCA proposed rule 7050.0255, Subp. 13, p. 4, ll. 6-22; Subp. 16, p. 5, ll. 5-9; Subp. 3, p. 3, l. 24 to p. 4, l. 4. The language used for this baseline is then inconsistently applies for individual permits and certifications and for storm water sewers and general permits. Compare MPCA proposed rule 7050.0265, Subp. 3, p. 13, ll. 16-19 and 7050.0270, Subp. 4, p. 15, l. 5 to p. 16, l. 3.

Retaining and clarifying the existing Minnesota baseline to prevent degradation of high quality waters is consistent with federal guidance, state policy and the prevention of incremental deterioration of water quality.

Recommendation:

Retain and clarify the existing Minnesota standard that uses Minnesota's January 1, 1988 adoption of antidegradation policy as the baseline for protection of high quality waters, unless water quality has improved since that date or adjustments are needed to provide more reliable data.

10. MPCA's proposed concepts for a "loading offset," "measurable" pollution and degradation that is "not reasonably quantifiable" could allow lowering of water quality in conflict with federal and state law and policy.

Minnesota's existing antidegradation rules do not use a "loading offset" to allow degradation of high quality waters. EPA guidance for the recently adopted antidegradation rules does not apply

⁷ See discussion and references in footnote 1, *supra*.

loading offsets. 80 Fed. Reg. 51029 -51035 (Aug. 21, 2015). The EPA Water Quality Standards Handbook does not include loading offsets in its guidance on antidegradation.⁸

MPCA justifies its “loading offset” concept on the basis of a case decided in the Minnesota courts, *In re City of Annandale*, 731 N.W. 2d 502 (Minn. S. Ct. 2007) that allowed a pollution offset for impaired waters. However, the *Annandale* case has not been followed in any federal court. In federal court, a similar NPDES issued by the EPA to allow an offset for increased pollution in impaired waters was disapproved on the grounds that the offset violated 40 C.F.R. §122.4(i). *Friends of Pinto Creek v. United States EPA*, 504 F. 3d 1007 (9th Cir. 2007), *cert denied by Carlota Copper Co. v. Friends of Pinto Creek*, 555 U.S. 1097 (2009).

WaterLegacy believes that any loading offset is problematic for antidegradation. Water quality standards and discharge monitoring reports are expressed as concentrations, not loadings. Vulnerability of aquatic life and wildlife to contaminants and impacts to human health from drinking polluted water or eating contaminated fish may be due to concentrations of pollutants in a particular segment of a water body. Some characteristics pertinent to degradation (radiation, thermal pollution) may not have any “loading” associated with them. Although parameter loadings should be part of the calculation for effluent controls, allowing offsets for degradation should only apply to an impaired water body and parameter for which a TMDL study has been done and a loading allocation determined.

If the State desired to evaluate a water quality offset for potential degradation, the MPCA’s proposed rule contains none of the regulatory provisions that would prevent an “offset” from being used as a loophole for degradation. MPCA’s proposal would not require that the offset reduction in pollution must occur for the same parameter and in the same water body and segment of the water body as the proposed discharge and would not require a demonstration that sufficient assimilative capacity had been created to allow a new or expanded discharge. MPCA’s proposal would not require any technical analysis of pollutant loading, would not require that the project proponent be legally responsible for implementing or financing the proposed reduction in pollution, would not require that the reduction in pollutants occur prior to the proposed activity that would result in degradation, and would not even limit the offset to that portion of the pollution controls on other loading that exceeds existing requirements. MPCA proposed rule 7050.0255, Subp. 22 and Subp. 23, p. 6, ll. 3-9.

The MPCA’s proposal for loading offsets would result in degradation of outstanding resource value waters as well as high quality waters. In MPCA’s proposed rule, the terms “loading offset” and “net loading” are used to replace the terms “new” and “expanded” discharge that currently limit degradation in outstanding resource value waters. *See e.g.* MPCA proposed rule 7050.0265, Subp. 7, p. 14, ll. 4-7; and 7050.0270, Subp. 6, p. 16, ll. 9-12 and *compare with* Minn. R. 7050.0180, Subp. 2, Items B and C.

⁸ EPA Water Quality Standards Handbook, Chapter 4 Antidegradation available at <https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter4.pdf>

Next, the MPCA's proposal to define degradation as "measurable" pollution requires clarification. Under Minnesota Statutes, pollution is defined as "the alteration made or induced by human activity of the chemical, physical, biological, or radiological integrity of waters of the state." Minn. Stat. §115.01, Subd. 13. To this definition, the MPCA has proposed to add the requirement that degradation be "measurable" defined as the "practical ability to detect a variation in water quality." MPCA proposed rule 7050.0255, Subp. 11, p. 3, l. 24 – p. 4, l. 4 and Subp. 24, p. 6, ll. 10-12. The SONAR suggests that this addition is meant to limit analysis of water quality changes to "standard procedures that are commonly available." MPCA SONAR, p. 36.

WaterLegacy believes that "degradation" must be defined to specifically include a reduction of the assimilative capacity of a water body. Qualitative changes in water quality should be explicitly included in the concept of "measurable" pollution. In addition, where the EPA has established methods for detecting conditions in water quality, those methods, rather than procedures which may be commonly available, should be used to evaluate water quality.

MPCA's creation of a separate standard when degradation is "not reasonably quantifiable" inappropriately combines dissimilar actions and creates the potential for significant degradation of water quality. There is no technical basis to assume that degradation from general permits or municipal storm sewer separation could not be quantified. Pollution from such activities could be significant and widespread.

Whether or not degradation from municipal storm sewer separation (MS4s) is easily quantified, WaterLegacy believes that a degradation standard for MS4s distinct from other individual permits may be justified. Storm sewer separation to eliminate municipal discharge of non-storm water discharges into sewers and abate this pollution is governed by federal and state law. *See* 33 U.S.C. § 1342(p)(3)(B); Minn. R. 7090.1000.

In July 2010, the MPCA drafted Proposed Antidegradation Implementation Procedures for NPDES-Permitted Phase II MS4s that explained the policy structure for a proposed rule.⁹ The MPCA's 2012 draft, the last version of the rules circulated to the public, then provided an intelligible structure for antidegradation review and preliminary antidegradation determination that would allow the benefits of municipal storm sewer separation and authorize degradation only when unavoidable and necessary. In comparison, the current MPCA proposed rule is convoluted and unclear. *See* MPCA 2012 proposed rules 7050.0355, Subp. 2 in wq-rule3-60 (Ex. 1-15) pdf at autop. 296 and MPCA proposed rule 7050.0270, Subp. 4, p. 15, ll. 5-25. WaterLegacy recommends that provisions for municipal storm sewer separation be based on the MPCA's 2012 draft proposal.

However, WaterLegacy objects to any rule proposal that would allow degradation of water quality as the result of issuance of general permits. General permits are discretionary. No party is entitled to their convenience. General permits should only be issued or certified if the

⁹ MPCA, Proposed Antidegradation Implementation Procedures for NPDES-Permitted Phase II MS4, July 19, 2010 draft, available at <https://www.pca.state.mn.us/sites/default/files/wq-rule3-38.pdf>

commissioner determines that degradation of water quality would be *avoided* for the activities governed by the general permit if general permit conditions are met. If not, the activities may still be allowable, but they would require individual permits and individual antidegradation assessment and control.

In addition, as provided in existing Minnesota rules, even if an applicant is eligible to be covered by a general NPDES permit, the MPCA must retain discretion to process an application as an individual permit if the activities or discharge of the applicant would be more appropriately controlled by an individual permit. Minn. R. 7001.0210, Subp. 6. The “further antidegradation procedures not required” sections in the MPCA’s proposed rules call into question the commissioner’s authority to require individual permits and individual antidegradation determinations if there is a reason to believe that a particular activity could result in degradation of water quality. MPCA proposed rule 7050.0295, Subp. 6, p. 27, ll. 3-8 (general permits); 7050.0305, Subp. 6, p. 28, ll. 17-22 (certifications for general permits).

Recommendations:

- Eliminate “loading offsets” concept to prevent degradation of water quality.
- Include in the definition of degradation “an alteration of the assimilative capacity of waters of the state.”
- Define “measurable” as the “ability to detect a quantitative or qualitative change in water quality using approved or best available methods.”
- Provide a clear antidegradation determination to allow only unavoidable and necessary degradation of water quality for municipal storm sewer separation (MS4s), using the MPCA’s 2012 draft rule 7050.0355, Subp. 2 as a starting point.
- Authorize general NPDES permits and certification of general federal permits only if degradation would be *avoided* if permit conditions were met.
- Clarify that MPCA authority is retained so that individual NPDES permits and antidegradation determinations can be required for activities eligible to be covered by a general NPDES permit if there is a reason to believe the activity could result in degradation.

11. MPCA’s proposed rules could allow dilution in low flow waters, including Lake Superior Basin headwater streams, in conflict with federal Clean Water Act regulations.

The level of pollution that will impair beneficial uses of water and consume the assimilative capacity of water depends on the amount of water contained in or flowing through receiving waters. Federal regulations governing the Great Lakes, including waters of the Lake Superior Basin, provide detailed implementation procedures for mixing zones that are reflected in existing Minnesota rules. See 40 C.F.R., Part 132, Appendix F, Procedure C; Minn. R. 7052.0210.

Broadly applicable federal NPDES permit rules provide that dilution in a mixing zone may only be used “where appropriate.” 40 C.F.R. §122.44(d)(1)(ii). The EPA Water Quality Standards

Handbook¹⁰ contains extensive guidance regarding mixing zones, including the need to establish critical low-flow values to make sure that controls of pollutants are sufficiently protective of aquatic life and human health when flow is insufficient to dilute ambient concentrations. EPA, Water Quality Standards Handbook, Ch. 5.2, pp. 11-14.

Minnesota rules reflect all of these requirements of federal law. As noted above, Minnesota rules in Chapter 7052 specify mixing zones for the Lake Superior Basin. Minnesota rules in Chapter 7050 require that water quality be maintained at minimum stream flows and set more stringent standards that don't allow dilution in mixing zones when stream flows are low. *See* Minn. R. 7050.0210, Subp. 5 through Subp. 7 and 7050.0222, Subp. 7, Item C. Minnesota rules generally applicable to mixing zones ensure that all of these requirements are followed. In Minnesota Rule 7053.0205, Subpart 5 provides general guidance on mixing zones; Subpart 6 preserves other requirements under federal law in Chapters 7052 (Lake Superior Basin) and 7050, stating that the most stringent rules apply in the event of a conflict; and Subpart 7 describes protections for minimum stream flow.

The MPCA's proposed rules defining degradation to allow dilution in mixing zones only reference Subpart 5 of Minnesota Rule 7053.0205. MPCA proposed rule 7050.0255, Subp. 11, p. 4, ll. 2-4. References to Subparts 6 and 7 are needed to preserve more stringent requirements in federal rules and in Minnesota Chapters 7050 and 7052 and to protect both the Lake Superior Basin and headwaters streams.

Recommendation:

If degradation is defined to allow dilution in mixing zones, requirements that protect low flow waters and preserve more stringent rules must be referenced. This can be accomplished by citing to Subparts 6 and 7 as well as Subpart 5 of Minnesota Rule 7053.0205.

12. MPCA's proposed exemptions from antidegradation standards and procedures could allow significant degradation in violation of federal regulations.

MPCA rules propose to create exemptions from any antidegradation procedures, including any public notice or public participation, for degradation of Class 7 surface waters classified for limited use and for "temporary and limited" degradation. MPCA proposed rules 7050.0275, Subp. 1 and Subp. 2, p. 16, l. 19 to p. 18, l. 23.

MPCA proposes an exemption from antidegradation procedural protection so long as the activity that degrades Class 7 waters does not "permanently" violate water quality standards. MPCA proposed rules 7050.0275, Subp. 1, Item B, p. 17, l. 1 and Subp. 2, Item C(2), p. 18, ll. 16-17. As explained in section 4 of these comments, rules to allow violation of water quality standards if they are not "permanent" violate federal regulations.

¹⁰ EPA, Water Quality Standards Handbook, Chapter 5: General Policies available at <https://www.epa.gov/sites/production/files/2014-09/documents/handbook-chapter5.pdf>

MPCA's exemption proposal would also avoid public review of the applicant's claims and commissioner's "judgment" about whether pollution of Class 7 waters will degrade downstream high or outstanding water quality. MPCA proposed rule 7050.0275, Subp. 1, Item C, p. 16, l. 22 to p. 17, l. 2. In Minnesota's water-rich environment, degradation of most Class 7 waters would risk degradation of connected and downstream waters with uses that are sensitive to pollution. For example, sulfate, ionic pollution and toxic metals may have no impact on limited industrial uses of Class 7 surface water, yet have devastating impacts on aquatic life, wildlife and human health downstream.

Basic hydrology, chemistry, biology and human toxicology all undermine the reasonableness of the MPCA's proposed exemption of Class 7 waters from antidegradation procedures. To exempt Class 7 waters from degradation review procedures conflicts with EPA guidance that, "Unless a state or authorized tribe can provide appropriate technical justification, it should not create categorical exemptions from Tier 2 review." 80 Fed. Reg. 51035 (Aug. 21, 2015).

MPCA's proposed rules would also exempt degradation of any waters for any parameters so long as there is a plan to return water quality to pre-activity conditions within 12 months. MPCA proposed rule 7050.0275, Subp. 2, Item A(3) and Item D, p. 17, ll. 14-16, p. 18, ll. 20-23.

Degradation of waters with a bioaccumulative toxin may permanently affect brain development in persons or wildlife eating contaminated aquatic life. A year of degradation that uses up a substantial portion of the assimilative capacity of receiving waters may impair fish or macroinvertebrates. Even relatively short-term degradation may be significant depending on its timing or if there have been other cumulative impacts to the same water body. Finally, MPCA's proposed time limit for degradation is not self-executing, since the rule only requires a plan, but no permit or certification would lapse if degradation continues despite the plan. Since Minnesota has no track record of rigorous and timely enforcement, it is likely that degradation authorized by the agency without public notice or scrutiny could persist for years, if not indefinitely.

MPCA's proposed categorical exemption for up to 12 months of degradation doesn't qualify as *de minimis* degradation, as required in EPA guidance. 80 Fed. Reg. 51035 (Aug. 21, 2015).

Recommendations:

- Should the state wish to allow exclusions from antidegradation determination, exclusions must require a demonstration that the degradation in that particular case, including impacts on downstream and connected waters, will be temporary and insignificant, considering the assimilative capacity of waters and the potential for bioaccumulation.
- Any proposed exclusions should be subject to public notice and participation requirements.
- Any proposed exclusions should be self-executing and both permits and certifications should include the condition that authority to continue the activity should lapse if water quality is not returned to pre-activity levels as represented.

13. MPCA proposed rules fail to provide for intergovernmental coordination and public participation required under federal and state laws and policies.

Federal regulations preclude degradation of high quality waters unless appropriate findings are made “after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process.” 40 C.F.R. §131.12(a)(2).

MPCA’s antidegradation rules make no provision for intergovernmental coordination on a permit or Section 401 certification. The MPCA’s SONAR suggests that providing a public notice to local, federal and state agencies and an opportunity for comment meets federal requirements. MPCA SONAR, p. 68. WaterLegacy believes that notice is not equivalent to “coordination.” In addition, under EPA guidance intergovernmental coordination should include tribal entities with an interest in water quality issues. 80 Fed. Reg. 51043 (Aug. 21, 2015).

WaterLegacy is also concerned that the way in which MPCA proposed rules are written may undermine public rights to a hearing on NPDES permits. MPCA’s proposed rules provide only notice and an “opportunity for comment” on a preliminary degradation determination whether that determination is made for NPDES permits or Section 401 certifications. The proposed rules cite the specific provisions of existing Minnesota rules pertaining to notice and comment, rather than the full range of public participation requirements under Minnesota rules. See MPCA proposed rules, 7050.0280, Subp. 5, p. 21, ll. 9-14 (NPDES permit); 7050.0285, Subp. 5 p. 23, ll. 11-14 (Section 401 for Individual Permit); 7050.0290, Subp. 5, p. 25, ll. 11-16 (NPDES Storm Sewers); 7050.0295, Subp. 4, p. 26, ll. 16-21 (General NPDES permit); 7050.0305, Subp. 4, p. 28, ll. 7-10 (Section 401 for General 404 Permit); 7050.0315, Subp. 4, p. 29, ll. 19-22 (Section 401 for other General Federal Permits).

In addition to being somewhat duplicative and confusing, this rule structure suggests that the cited notice and comment provisions are the *only* public participation requirements that apply to antidegradation determinations for the identified permits or Section 401 certifications. The SONAR doesn’t explicitly state an intention to eliminate public meeting and hearing procedures, but the implication in the SONAR is that receiving comments is the only form of public participation contemplated by MPCA when decisions are made on permits or certifications that result in degradation. *See e.g.* MPCA SONAR, pp. 68, 70, 82.

Such an implication would violate both state and federal law. Federal regulations require that states provide public hearings for NPDES permits. 40 C.F.R. §123.25(a)(29) and (30); 40 C.F.R. §§124.11, 124.12(a).

Minnesota statutes provide for judicial review of a decision to deny a contested case hearing on issuance of either a permit or certification. Minn. Stat. §115.05, Subd. 11(4). Minnesota statutes also require at least one public meeting outside the seven-county metropolitan area prior to making a decision on Section 401 certification for a general U.S. Army Corps permit. Minn. Stat. §115.03, Subd. 4a(b).

Existing Minnesota procedural rules, in addition to public notice and comment, also provide for a public informational meeting and a contested case hearing before a final determination is made on any NPDES permit. Minn. R. 7001.0120; 7001.0130. Minnesota's current antidegradation procedures also ensure that there will be an opportunity for a public hearing before the agency determines that there are no prudent and feasible alternatives to degradation of outstanding resource value waters. Minn. R. 7050.0180. Subp. 8. MPCA's proposed rule excludes this hearing right, while allowing public hearings if new outstanding resource value waters are proposed to be designated. MPCA proposed rule 7050.0335, Subp. 5, p. 37, ll. 20-24.

WaterLegacy believes that federal law requiring public hearings on NPDES permits and existing Minnesota public hearing and meeting requirements must be followed when degradation of Minnesota waters is proposed to be authorized in permits or certifications. Consistent with federal antidegradation regulations and State Executive Order 13-10 issued by Governor Dayton on August 8, 2013,¹¹ it is necessary as well as reasonable to include intergovernmental coordination with tribal governments in proposed antidegradation rules.

Recommendations:

- Clarify that all provisions pertaining to public meeting and hearing rights in federal regulations or state law apply to an action pertaining to an antidegradation determination, specifically including in NPDES permit matters all public participation provided in Minnesota Rules Parts 7001.0010 through 7001.0210.
- Ensure the opportunity for a public hearing before a determination can be made that there are no feasible alternatives to degradation of outstanding resource value waters.
- Rewrite and consolidate antidegradation procedural rules to provide greater transparency.
- Require notice to tribal governments potentially affected by degradation and an opportunity for consultation and coordination.

Conclusion

WaterLegacy has significant concerns about the process by which MPCA's proposed antidegradation rules were developed. We are concerned about the potential influence of mining interests and other dischargers and about the MPCA's failure to consult with conservation groups, public health stakeholders and the Minnesota Health Department.

WaterLegacy's objection to the MPCA's proposed antidegradation rules are also deeply substantive. As described in detail in the thirteen sections of these comments above, we believe that the proposed rules would allow pollution that causes or contributes to violation of water quality standards, allow removal of existing uses, foster degradation of high value and outstanding resources values, foster deterioration of water quality, remove protection for wildlife and human health, remove protection from drinking water and groundwater, preclude a rigorous analysis of alternatives and whether degradation is actually unavoidable and necessary, allow excessive delegation to applicants of decisions about degradation, exempt potentially significant

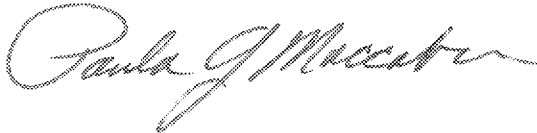
¹¹ Executive Order 13-10, Affirming the Government -to-Government Relationship between the State of Minnesota and the Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation, available at https://mn.gov/governor/assets/EO-13-10.pdf_tcm1055-92492.pdf?sourcePage=%2fgovernor%2fresources%2fexecutive-orders%2findex.jsp%3fid%3d1055-96730

WaterLegacy Comments - MPCA Proposed Antidegradation Rules
March 23, 2016
Page 23

degradation from review, and undermine public participation in agency decisions regarding degradation of water quality.

WaterLegacy respectfully requests that the MPCA's proposed antidegradation rules be disapproved by the Administrative Law Judge or withdrawn by the MPCA so that their principal sections can be substantially rewritten.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Paula Goodman Maccabee".

Paula Goodman Maccabee
Advocacy Director/Counsel for WaterLegacy

cc: Linda Holst (Holst.Linda@epa.gov)
David Pfeifer (Pfeifer.David@epa.gov)

Exhibits attached.